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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MATTHEW HOGAN, Plaintiff, v. MATTHEW J. WEYMOUTH, PATRICK C. CHUNG, PRO SPORTORITY (ISRAEL) LTD., KARL RASMUSSEN, BEASLEY BROADCAST GROUP INC., MELISSA EANNUZZO, and DOES 1-10, Defendants.	No. 2:19-cv-02306-MWF-AFMx **NOTICE OF MOTION AND MOTION TO DISMISS BY DEFENDANT PATRICK CHUNG** Date: October 21, 2019 Time: 10:00 a.m. Location: Courtroom 5A Judge: Michael W. Fitzgerald

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 21, at 10:00 a.m. or as soon thereafter as this matter may be heard in Courtroom 5A of the above-entitled court, located at 350 West 1st Street, Los Angeles, CA 90012, Patrick Chung will and hereby does move to dismiss with prejudice all claims against him by plaintiff Matthew Hogan, for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), and for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6).

Defendant Patrick Chung is a resident of Massachusetts. He is not alleged to have committed any acts in California, and did not purposefully direct any activity toward California. Chung accordingly lacks sufficient "minimum contacts" for this Court to sustain personal jurisdiction over him consistent with constitutional principles of due process, and so the case must be dismissed pursuant to Fed. R. Civ. P. 12(b)(2).

Even if jurisdiction existed, all claims against Chung must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because they fail to state a claim upon which relief may be granted. In particular:

(1) Plaintiff's defamation claim fails because the statements in Chung's social media postings were substantially true, and because his post constituted protected opinion;

(2) Plaintiff's false light claim fails for the same reasons as his defamation claim;

(3) Plaintiff's intentional infliction of emotional distress claims fails because it is duplicative of the defamation claim, because Chung's conduct was not extreme and outrageous, and because Plaintiff has not alleged facts showing severe emotional distress; and

(4) Plaintiff's "public disclosure of private facts" claim fails because plaintiff has not alleged facts showing that Chung published intimate details about plaintiff's life, and because the statements at issue are newsworthy.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on September 3, 2019.

This Motion is based on this Notice; on the attached Memorandum of Points and Authorities; on the Second Declaration Patrick Chung; on any other matters of which this Court may take judicial notice; on all pleadings, files and records in this action; and on such argument as may be received by this Court at the hearing on this Motion.

Dated: September 19, 2019

Respectfully submitted,

/s/ Jeffrey J. Pyle

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I. SUMMARY OF ARGUMENT

Defendant Patrick Chung, a resident of Massachusetts, has been sued in this Court based solely on speech he posted to the Internet. Courts have long held that the mere posting of material online is not sufficient to subject a defendant to nationwide jurisdiction; were it otherwise, every internet-based defamation case could be brought in any state in the union. Chung did not engage in any activities in California relevant to this suit, nor did he draw any information from California that was used in his postings. Accordingly, the claims against Chung must be dismissed for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2).

Even if jurisdiction over Chung were proper, Hogan has failed to state a claim against him.

Hogan fails to state a defamation claim because Chung's social media posts were substantially true. Like the articles by Beasley Media Group, LLC and Melissa Eanuzzo ("Beasley") which the Court has already held to be substantially true, the posts do not contain any inaccuracy that creates a different effect on the mind of the reader than the truth as Hogan has pleaded it. Further, Chung's statement that Hogan's text messages were disrespectful amounts to pure opinion that cannot support a libel claim.

Hogan's claims of false light invasion of privacy and intentional infliction of emotional distress rise or fall with the fortunes of the defamation claim. And, Hogan fails to allege facts showing extreme or outrageous conduct, or that he suffered severe emotional distress.

Finally, Hogan's claim against Chung for disclosure of intimate private facts fails for three reasons: the information disclosed—the content of Hogan's text messages to Weymouth—(1) does not amount to "intimate details" of Hogan's private life, (2) was not "private," and (3) was newsworthy as a matter of law.

II. STATEMENT OF FACTS

Defendant Patrick C. Chung ("Chung") is a resident of Massachusetts. (Compl. ¶ 4; Second Chung Dec. ¶ 2). Chung is a professional football player for the New England Patriots. (Second Chung Dec. ¶ 2). Chung owns no assets in California, and, apart from playing an occasional football game in the state, does not do business in California. (Chung Dec. ¶¶ 3-4). Chung spent part of his youth living in California, but has not been a resident of the state since 2004. (*Id.*)

Plaintiff Matthew Hogan ("Hogan") is a resident of California. (Compl. ¶ 2). In early 2019, Hogan was working for the Los Angeles Rams as an "account executive." (Compl. ¶ 2). The Rams were scheduled to play the New England Patriots in Super Bowl LIII on February 3, 2019. Hogan alleges that in the days leading up to the Super Bowl, he learned through social media that an acquaintance, Matthew Weymouth, would be attending the event in Atlanta, Georgia. (Compl. ¶¶ 16-21). Hogan also planned to attend the game, and he communicated with Weymouth in the days leading up to it. Weymouth and Hogan also met up for drinks in Atlanta in the days leading up to the game. (Compl. ¶ 22).

Hogan acknowledges that he knew that Weymouth was a Patriots fan and that Weymouth had a social relationship with Chung. (Compl. ¶ 15). Hogan also knew that Weymouth was traveling on the Patriots' charter airplane to Atlanta. (*Id.*; Ex. A).

During the third quarter of the Super Bowl, Chung was seriously injured in the midst of a tackle, breaking his right forearm. (Compl. ¶ 31). Immediately after this injury, Hogan texted Weymouth: "Patrick Chung is a bitch." (Compl. ¶ 27). Hogan alleges that he intended the statement as a joke, but Weymouth, concerned about his injured friend Chung, sent a text to Hogan (strenuously) rebuking him for this comment. (Compl. ¶ 34 and Ex. A). Hogan responded by mocking Weymouth. (Compl. Ex. A).

Hogan alleges that after the game, Weymouth took screenshots of parts of the text exchange and shared them with Chung, including the disparaging comment Hogan made about Chung after his injury. (Compl. ¶ 32). Chung then posted the screenshots on his Instagram and Facebook pages, along with a comment criticizing Hogan for disrespectfully mocking an injured player. (Compl., ¶¶ 34-36).

Hogan filed the instant Complaint on March 28, 2019 against Chung, Weymouth, and several media entities and reporters who reported on Chung's social media postings. Hogan alleges four claims against Chung: Defamation, Disclosure of Intimate Private Facts, "False Light Publicity," and "Intentional Infliction of Emotional Distress." (Compl. Counts 1, 2, 3 and 4).

Plaintiff's complaint acknowledges that the screenshots contained in Chung's postings accurately portray his text exchange with Weymouth. However, Hogan complains that Chung posted the screenshots in such a way as to make it appear that the text conversation was "an exchange between Hogan and Chung himself," rather than between Hogan and Weymouth. (Compl. ¶¶ 34, 38). Hogan also asserts that the postings imply that he was "positioned to speak for the Rams" when in fact he was but "one of eight ticket sales account executives." (*Id.*, ¶ 38).

On August 19, 2019, the Court granted a motion to dismiss brought by Beasley, which had reported on Chung's social media posts and Hogan's texts. The Court held, among other things, that Hogan's defamation count failed to state a claim because Beasley's reporting was substantially true: "Plaintiff called Mr. Chung a derogatory word because of his injuries in the Superbowl. Mr. Chung then posted this exchange on social media, stating that it was "disrespectful of [Plaintiff]" and showing Plaintiff's response that he "was seriously just messing around with [Mr. Chung]." (Order, Dkt. No. 48 at 9). Further, "[t]o the extent that Defendants' statements implied that Plaintiff was unprofessional, insensitive, and aggressive, those implications are statements of opinions and non-actionable." (*Id.* at 8). The

Court also dismissed Hogan's other claims for failure to state a claim on which relief could be granted.

III. THIS COURT LACKS PERSONAL JURISDICTION OVER CHUNG

"Due process requires that the defendant have certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015) (internal quotations omitted). Patrick Chung has no relevant "contacts" with California, is not alleged to have committed any acts in California, and did not purposefully direct any activity toward California. Accordingly, the Court lacks jurisdiction over Chung, and the claims against him must be dismissed.

On a motion such as this, "the plaintiff bears the burden of establishing that jurisdiction is proper."[1] *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir. 2015) (internal quotations omitted). There are two types of personal jurisdiction, "general" and "specific." Plaintiff alleges no facts remotely suggesting that Chung could be subjected to "general jurisdiction," which requires that the defendant's "affiliations with the State in which suit is brought [be] so constant and pervasive as to render [him] essentially at home in the forum State." *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014). Moreover, as Chung states in his declaration, he does not reside in California and apart from visiting family there, has no constant and pervasive contacts with the state. (Chung Dec. ¶¶ 3-4). Accordingly, the balance of this section will address whether the Court has "specific jurisdiction," meaning jurisdiction that derives from the facts alleged in this case.

[1] The discussion below will be confined to the question of whether jurisdiction is proper under the due process clause of the 14th Amendment to the U.S. Constitution, and will not separately address the California "long arm" statute. The long-arm statute, Cal. Civ. Proc. Code § 410.10, is coextensive with federal due process requirements, and therefore the jurisdictional analyses under state law and federal due process are the same. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011); *Rosen v. Terapeak, Inc.*, No. CV-15-00112-MWF (EX), 2015 WL 12724071, at *2 (C.D. Cal. Apr. 28, 2015).

This Circuit applies a three-part test to determine whether specific jurisdiction exists over a non-resident defendant:

(1) the non-resident defendant must purposefully direct his activities to or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;

(2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and

(3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004). Hogan bears the burden of proof on prongs (1) and (2). In this process, "[t]he parties may submit, and the court may consider, declarations and other evidence outside the pleadings in determining whether it has personal jurisdiction." *Kellman v. Whole Foods Mkt., Inc.*, 313 F. Supp. 3d 1031, 1042 (N.D. Cal. 2018) (citing *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001)).

As explained below, Hogan cannot satisfy either the "purposeful direction" standard, nor can he show that the claims against Chung arise out of his California-related activities.

A. Chung Did Not Purposefully Direct Activities at California

Hogan's claims sound in tort, and therefore he must show that Chung "purposefully direct[ed]" his activities toward California. *Schwarzenegger*, 374 F.3d at 802; *Perry v. Brown*, No. CV 18-9543-JFW(SSX), 2019 WL 1452911, at *6 (C.D. Cal. Mar. 13, 2019) ("the purposeful direction concept applies in tort cases"). A showing of purposeful direction "requires that the defendant . . . have (1) committed an intentional act; (2) expressly aimed at the forum state; and (3) causing harm that the defendant knows is likely to be suffered in the forum state."

Schwarzenegger, 374 F.3d at 803. Here, Chung is alleged to have committed intentional acts, but none of them was "expressly aimed" at California in particular.

The Supreme Court has held that to satisfy due process, "there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place *in the forum State* and is therefore subject to the State's regulation.'" *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017) (emphasis supplied) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). "When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id.* at 1781; *see also Daimler AG*, 571 U.S. at 127 (specific jurisdiction over a non-resident defendant may exist where a suit "arises out of or relates to the defendant's contacts *with the forum*") (internal citations omitted) (emphasis supplied).

Here, no "activity or . . . occurrence . . . [took] place in the forum State." *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780. Rather, while in Massachusetts, Chung published social media postings that were equally available in all 50 states and worldwide. (Compl., ¶¶ 34-36; Second Chung Dec. ¶ 5). The courts have long held that a non-resident's act of uploading information to a website that is available for all to see is insufficient to establish nationwide personal jurisdiction. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1229 (9th Cir. 2011) ("[W]e have made clear that 'maintenance of a passive website alone,'" without "something more," "'cannot satisfy the express aiming prong.'") (quoting *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010)); *see also, e.g., Remick v. Manfredy*, 238 F.3d 248 (3rd Cir. 2001) ("[T]he mere posting of information or advertisements on an Internet website does not confer nationwide personal jurisdiction."); *Edwards v. Schwartz*, 378 F. Supp. 3d 468, 492 (W.D. Va. 2019) ("[M]ere injury to a [forum state] resident is not a sufficient connection," and therefore "posting defamatory statements on social media, without more, does not

constitute purposeful availment."); *Sec. Alarm Fin. Enterprises, L.P. v. Nebel*, 200 F. Supp. 3d 976, 985 (N.D. Cal. 2016) (defendant's "social media posts are insufficient to establish personal jurisdiction."); *Professional's Choice Sports Med. Prod., Inc. v. Hegeman*, No. 15-CV-02505-BAS(WVG), 2016 WL 1450704, at *5 (S.D. Cal. Apr. 12, 2016) (holding no personal jurisdiction over Utah resident who made allegedly false statements on Facebook page, because, "the Facebook page was, in essence, a passive posting of information available for all to see").

Nor can Hogan satisfy personal jurisdiction by pointing to the alleged effects the postings had on him in California. As the Supreme Court held in *Walden v. Fiore*, 571 U.S. 277, 285 (2014), "[t]he plaintiff cannot be the only link between the defendant and the forum." *Walden*, 571 U.S. at 285. Here, the only relevant connection between Chung and California is the (insufficient) fact that Hogan resides there.

In his oppositions to the motions to dismiss of defendants Matthew Weymouth and Pro Sportority, Hogan cited *Calder v. Jones*, 465 U.S. 783 (1984), for the proposition that the "purposeful direction" test "focuses on the forum in which the defendant's actions were felt, regardless of where they originated." (Hogan Opposition to Pro Sportority Motion to Dismiss, Doc. 52 at 8) (internal quotations omitted). Hogan's interpretation of *Calder* is untenable—all the more so in light of the Court's more recent decisions on personal jurisdiction.

In *Calder*, the actress Shirley Jones, a California resident, sued the Florida-based *National Enquirer* for defamation based on a story that suggested she had acted unprofessionally in California acting jobs. *Calder*, 571 U.S. at 788 and n. 9. The *Calder* Court relied on the fact that California, where Jones' alleged conduct took place, was the "focal point" of the story, and that the story was drawn from California sources. *Id.* at 789. The Court also relied on the fact that the *National Enquirer* had its largest circulation in that state. *Id.* The unambiguous connections to California articulated in *Calder* provide a good comparison against the present

situation, where nothing in Chung's allegedly defamatory social media postings was drawn from California sources nor directed at alleged California conduct.

Hogan's focus on the "effects" of the alleged tortious also overlooks *Walden*, in which the Court clarified that "mere injury to a forum resident is not a sufficient connection to the forum." 571 U.S. at 285. The due process analysis, the Court held, must "look[] to the defendant's contacts with *the forum State itself*, not the defendant's contacts with persons who reside there." *Id.* at 285 (emphasis supplied); *see also id*. at 284, 290. As this Court later summarized, *Walden* holds that the "analysis must focus on the defendant's wrongful acts directed at the forum, rather than the effect those acts have on a plaintiff in their place of residence." *Rosen*, 2015 WL 12724071, at *6.

Here, Chung has no "jurisdictionally relevant" contacts with California. *Walden,* 571 U.S. at 290 ("Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State.") He did not commit any act in California or specifically direct any activity into California. Accordingly, Hogan cannot shoulder his burden of demonstrating that Chung purposefully directed any activity toward California, and personal jurisdiction must be deemed improper on this basis alone.

For the same reasons, Hogan's claims against Chung do not "arise[] out of or relate[] to the defendant's forum-related activities." *Schwarzenegger*, 374 F.3d at 802. None of Chung's alleged acts took place in California, nor were they directed at California. For this additional reason, personal jurisdiction is improper.[2]

[2] The Court need not address the reasonableness of jurisdiction under the "gestalt" factors, because Plaintiff plainly cannot satisfy the threshold standards for the exercise of personal jurisdiction.

IV. HOGAN FAILS TO STATE A CLAIM AGAINST CHUNG

Even if Hogan were able to establish personal jurisdiction over Chung, his complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because it fails to state any claim upon which relief may be granted.

B. Hogan Fails to State a Defamation Claim Against Chung

1. Chung's Statements Were Substantially True

Chung cannot be held liable for defamation because his statements were substantially true. Indeed, the Court has effectively held as much.

To state a defamation claim, a plaintiff must show that the defendant's allegedly defamatory statement was false. *Taus v. Loftus*, 40 Cal. 4th 683 (2007) (holding that falsity is an element of defamation claim). "The plaintiff cannot be said to have carried this burden so long as the statement appears *substantially* true." *Vogel v. Felice*, 127 Cal. App. 4th 1006, 1021 (2005) (emphasis in original). A "statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Masson v. New Yorker Magazine, Inc*., 501 U.S. 496, 517 (1991) (quoting R. Sack, Libel, Slander, and Related Problems 138 (1980)).

Here, the statements or implications Hogan identifies in support of his claim against Chung are the same as those he asserted in his now-dismissed claim against Beasley. (Compare Compl., ¶¶ 38, 51). He contends that Chung's posts are false because they allegedly stated (1) that Hogan was "positioned to speak for the Rams," (2) that Hogan sent the "bitch" text to Chung rather than Weymouth, (3) that Hogan sent the text "as a taunt," (4) that he knew that Chung's injury was serious and/or that Chung would not return to the game when he sent the text, (5) he received the responding texts from Chung, and (6) that Chung wrote the social media posts. (Compl., ¶ 38).

As the Court noted on Beasley's motion, none of these alleged falsities make a difference on the mind of the reader, because they "do not affect the substance of the

communications, that Plaintiff called Mr. Chung a derogatory word because of his injuries in the Superbowl," and "Mr. Chung then posted this exchange on social media, stating that it was 'disrespectful of [Plaintiff]' and showing Plaintiff's response that he 'was seriously just messing around with [Mr. Chung].'" (Dkt. No. 48 at 9). That ruling was correct, and it dooms Hogan's claims against Chung just as it did the claims against Beasley. Below, we address each allegedly false statement or implication in further detail.

a. Whether Hogan was "positioned to speak for" the Rams

Chung's social media posts state only the true fact that Hogan was "from the @rams organization"—they did not state or imply that Hogan was "positioned to speak for" the team. (Compl., ¶ 35). In any event, such a statement does not create a different effect on the mind of the reader than the "pleaded truth": that Hogan was employed by the Rams as "one of eight ticket sales account executives." (Compl., ¶ 38). *Masson*, 501 U.S. at 517. Either way, Hogan was a Rams employee, and he "made [the] statements about Mr. Chung" during the game. (Dkt. No. 48 at 10).

b. The addressee of the texts

As the Court has already held, the alleged implication in the postings that "Plaintiff sent the text messages to Mr. Chung, rather than sending the text to Mr. Weymouth," does not create a sufficient difference in the mind of the reader to render the posts materially false. (Dkt. No. 48 at 9).

c. A "taunt" versus a "joke."

Chung's social media posts do not say that Hogan intended his "bitch" remark "as a taunt" as opposed to a "joke," as Hogan claims. (Compl., ¶¶ 34-36). Indeed, any such supposed implication is unsupportable, considering the posts included a screenshot of Hogan's text saying that he intended the remark as a joke. (*Id.* ¶ 34 (reflecting Hogan's text: "Dude, I was seriously just messing around with you. . . . [I]t was all in just fun and sorry you didn't take it that way.")) Regardless, the fine distinction Hogan attempts to draw between calling someone a "bitch" as a "taunt"

rather than as a "joke" does not make a sufficient difference on the mind of the reader to overcome the substantial truth of the posts. *Masson*, 501 U.S. at 517. Indeed, any implication concerning Hogan's motivation or intent in sending the text would be non-actionable as a matter of law, because it is not capable of being proved false. *Murray v. HuffingtonPost.com, Inc.*, 21 F. Supp. 3d 879, 886 (S.D. Ohio 2014) (dismissing defamation claim against a blog for statement concerning motive because that "there are no objective tests to determine [a person's] internal motivation.")

d. Hogan's knowledge of Chung's injury

Chung's social media postings do not state or imply that Hogan knew the full extent of Chung's injuries when he sent his text. (Compl., ¶ 34-35). However, even if they did so imply, Hogan admits that at the time he sent the text, "Chung appeared to be injured and trainers [had come] on the field." (Compl., ¶ 25). The difference between sending the text when Chung's exact injury was known—as opposed to sending it during the uncertain period when Chung "appeared to be injured"—does not render the posts actionably false. (Compl., ¶ 25).

e. Whether Hogan Received the Responsive Texts from Chung or Weymouth

The identity of the person who wrote the responsive texts in the screenshots makes no difference as to the truth or falsity of any allegedly defamatory statements concerning Hogan.

f. Whether Chung or Weymouth Wrote the Social Media Posts

Likewise, whether Chung or Weymouth wrote the social media posts has no effect on the mind of the reader as to the truth of the statements concerning Hogan.

* * *

Accordingly, the Court should reach the same conclusion it did in regard to the Beasley motion: Hogan has failed to allege sufficient facts showing the essential element of falsity to support his defamation claim.

2. The Statements Are Not Defamatory

In order to recover for defamation, Hogan must show that the *false* statements at issue are defamatory. *Taus*, 40 Cal. 4th at 720 (defamation "involves a publication that is [both] false [and] defamatory"). A defamatory statement is one that holds the plaintiff "to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." *Brodeur v. Atlas Entm't, Inc*., 248 Cal. App. 4th 665, 678 (2016).

Here, even if the statements identified above could be deemed to be anything other than substantially true, they are not *defamatory*. The alleged implication, for example, that Hogan was "positioned to speak for the Rams," as opposed to being a ticket account executive, does not hold him up to hatred or contempt. Nor does the statement that Hogan had the text exchange with Chung, as opposed to Weymouth. *Gang v. Hughes*, 111 F. Supp. 27, 29 (S.D. Cal. 1953) (language that merely annoys the plaintiff or hurts his feelings is not defamation). Accordingly, Hogan fails this prong of the defamation standard, as well.

3. Chung's Social Media Posts Constitute Protected Opinion

Hogan cannot recover for defamation from Chung for a third reason: Chung's social media posts constitute opinion protected by the First Amendment.

"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 339-40 (1974).

As part of this principle, the courts have long held that "when a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment." *Partington v. Bugliosi*, 56 F.3d 1147, 1156 (9th Cir. 1995). Where "the bases for the . . . conclusion are fully disclosed, no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related." *Chapin v. Knight-Ridder, Inc*., 993 F.2d 1087, 1093 (4th

Cir. 1993); *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 730 (1st Cir. 1992) (defendant's "full disclosure of the facts underlying his judgment" rendered statements that theater production was a "fake" and "a rip-off, a fraud, a scandal, a snake-oil job" protected opinion).

The posts here merely expressed Chung's opinion, based on the disclosed, admittedly true, non-defamatory fact of Hogan's text messages, that Hogan's statements were "disrespectful" and that Hogan should be "ashamed" of them. (Compl., ¶ 35). In support of this conclusion, Chung attached the texts themselves, which disclose both the "bitch" comment and Hogan's explanation that his comment "was all in just fun" and that he was "just messing around" with the recipient. "[W]hen an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment." *Riley v. Harr*, 292 F.3d 282, 289 (1st Cir. 2002). Accordingly, Hogan's defamation claim fails for this additional reason. (Order, Dkt. No. 48 at 8 (implication that Hogan was unprofessional, insensitive and aggressive would constitute non-actionable opinion)).

C. Hogan's False Light Claim Falls with the Defamation Claim

In its August 20, 2019 ruling, the Court held that Hogan's false light claim against Beasley failed because it was based on the same publication as Hogan's unsuccessful defamation claim. (Dkt. No. 48 at 11); *see Jackson v. Mayweather*, 217 Cal. Rptr. 3d 234, 256 (2017) ("When a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action.") Thus, Hogan's false light claim should be dismissed for the reasons set forth above.

D. Hogan Fails to State a Claim for Intentional infliction of Emotional Distress

"An emotional distress claim based on the same set of facts as an unsuccessful libel claim cannot survive as an independent cause of action." *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890, 893 n. 4 (9th Cir. 1988) (citing *Flynn v. Higham*, 149 Cal. App. 3d. 677, 682 (1983)). "[T]o allow an independent cause of action for the intentional infliction of emotional distress based on the same acts which would not support a defamation action, would allow plaintiffs to do indirectly what they may not do directly. It would also render meaningless any defense of truth or privilege." *Flynn*, 149 Call App. 3d at 682. Accordingly, Hogan cannot evade the fact that that his defamation claim is based on substantially true and non-actionable statements by re-captioning it as one for intentional infliction of emotional distress (IIED).

Hogan's IIED claim also fails on its own terms. As with his identical claim against Beasley, he alleges no facts showing that Chung's conduct was "extreme and outrageous." (Dkt. No. 48 at 12). For purposes of this tort, "extreme and outrageous conduct" generally "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities, but only to conduct so extreme and outrageous as to go beyond all possible bonds of decency." *Ankeny v. Lockheed Missiles & Space Co*., 88 Cal. App. 3d 531, 537 (1979) (citation omitted) (demurrer with respect to claim for intentional infliction of emotional distress); *Braunling v. Countrywide Home Loans Inc*., 220 F.3d 1154, 1158 (9th Cir. 2000) ("Conduct which exhibits mere rudeness and insensitivity does not rise to the level required for a showing of intentional infliction of emotional distress."). The mere publication of Hogan's text messages does not meet this standard.

Even if Hogan could meet this hurdle, however, his claim of IIED should be dismissed because he has failed to allege facts showing *severe* emotional distress. "'With respect to the requirement that the plaintiff show severe emotional distress, this court has set a high bar. Severe emotional distress means emotional distress of

such substantial quality or enduring quality that no reasonable person in civilized society should be expected to endure it.'" *Duronslet v. Cty. of Los Angeles*, 266 F. Supp. 3d 1213, 1220 (C.D. Cal. 2017) (quoting *Hughes v. Pair*, 46 Cal. 4th 1035, 1051 (2009) (allegation that the plaintiff suffered "discomfort, worry, anxiety, upset stomach, concern, and agitation" insufficient)). In *Duronslet,* the court dismissed an IIED claim where the plaintiff alleged that she suffered "shock, embarrassment, and emotional distress" as a result of the defendant's conduct, because these were "simply insufficient allegations" of severe emotional distress. Here, Hogan has merely alleged, in purely conclusory fashion, that he suffered "severe emotional distress." (Compl. ¶¶ 59, 88). This is plainly insufficient, and his IIED claim must be dismissed for this reason as well.

E. Hogan Fails to State a Claim for Public Disclosure of Intimate Private Facts

The California Supreme Court has "set forth the elements of the public-disclosure-of-private-facts tort as follows: '(1) public disclosure, (2) of a private fact, (3) which would be offensive and objectionable to the reasonable person, and (4) which is not of legitimate public concern.'" *Karimi v. Golden Gate Sch. of Law*, 361 F. Supp. 3d 956, 980 (N.D. Cal. 2019) (quoting *Taus,* 40 Cal. 4that 717). To meet this test, the disclosure at issue must reveal "intimate details of plaintiffs' lives." *Taus,* 40 Cal. 4th at 718 (2007) (emphasis supplied) (noting that the "public-disclosure-of-private-facts tort applies to 'the unwarranted publication by defendant of intimate details of plaintiffs' lives'") (quoting *Coverstone v. Davies,* 38 Cal.2d 315, 323 (1952)); *Sipple v. Chronicle Publ'g Co*., 154 Cal. App. 3d 1040, 1047 (Ct. App. 1984) (defining "public disclosure of private facts" as "the unwarranted publication of intimate details of one's private life which are outside the realm of legitimate public interest.").

The text messages by Hogan that Chung posted to his social media accounts did not reveal "intimate private details" of Hogan's life. *Karimi*, 361 F. Supp. 3d at

980 (statement that plaintiff had been required to leave law school for period of time did not reveal intimate details). Rather, they merely showed that Hogan "called Mr. Chung a derogatory word because of his injuries in the Superbowl." (Order, Dkt. No. 48 at 9). The claim fails for this reason alone.

Even if the text messages could somehow be deemed "intimate details," however, the texts are of "legitimate public concern" because they involve an employee of the Los Angeles Rams making disrespectful and mocking comments about a seriously injured player on the opposite team in the midst of the biggest game of the year. *Karimi*, 361 F. Supp. 3d at 980. The posts led to significant media attention, demonstrating the public interest behind them. *See, e.g.*, Compl. ¶¶ 46 & 48, and Exs. B-F. This interest extended to social media as well: Exhibit D to the Complaint shows that Chung's Instagram post revealing the text messages had garnered 4,693 "likes" and 357 comments by the time defendant Beasley published its article concerning the post. *Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 695 (2012) (the "fact that [defendant's] posts drew numerous comments" showed "considerable public interest"); *Hecimovich v. Encinal School Parent Teacher Organization*, 203 Cal. App. 4th 450, 467 (2012) (statements criticizing a volunteer fourth grade basketball coach's treatment of his players a matter of public interest because of broad importance of child safety in sports.) Accordingly, the disclosure of the texts was outside the scope of the "private facts" tort. *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 225 (1998), as modified on denial of reh'g (July 29, 1998) ("[A] publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it.")

In earlier filings, Hogan cited *Briscoe v. Reader's Digest Ass'n, Inc.*, 4 Cal. 3d 529, 543 (1971), for the proposition that a jury must always determine whether a fact constitutes "intimate private details," and whether it is newsworthy. *Id., overruled by Gates v. Discovery Comm'ns, Inc.*, 34 Cal. 4th 679, 696-697 & n. 9 (2004). *Briscoe*, however, says no such thing.

In *Briscoe*, Reader's Digest published the fact that 11 years earlier, the plaintiff had hijacked a truck and fought a gun battle with police. The plaintiff sued, alleging that he had paid his debt to society and rehabilitated himself, and therefore the publication invaded his privacy. The court, in 1971, held that in that particular case, "a jury could reasonably find that plaintiff's identity as a former hijacker" of a truck "was not newsworthy." *Id.* at 541. *Briscoe* did *not* hold that a jury must *always* make the determinations of whether a statement is an intimate private fact or is newsworthy.[3]

To the contrary, in many invasion of privacy cases after *Briscoe*, the courts have determined that particular facts did not constitute intimate details, or that they were newsworthy, as a matter of law. *See, e.g., Karimi*, 361 F. Supp. 3d at 980 (granting summary judgment on intimate private facts claim based on law school's disclosure that student had been asked to leave campus indefinitely, because the fact was not "the sort of 'intimate detail' protected from disclosure under California tort law."); *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 228, 955 P.2d 469, 488 (1998) (on appeal from summary judgment ruling, holding that the "disputed material was newsworthy as a matter of law."); *Lorenzo v. United States*, 719 F. Supp. 2d 1208, 1215 (S.D. Cal. 2010) (granting motion to dismiss intimate private facts claim based on report of border shooting, holding that the border patrol agent's "name, the location of the event, and the events surrounding the altercation are not private matters," and shooting was "clearly a newsworthy event" as a matter of law); *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1145 (S.D. Cal. 2005)

[3] In *Gates v. Discovery Commc'ns, Inc.*, 34 Cal. 4th 679, 696 (2004), the court overruled *Briscoe*, holding that under the First Amendment, the media cannot be sued for publishing truthful information obtained from court records. *Id.* ("Accordingly, following [*Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975)] and its progeny, we conclude that an invasion of privacy claim based on allegations of harm caused by a media defendant's publication of facts obtained from public official records of a criminal proceeding is barred by the First Amendment to the United States Constitution.")

(holding on Rule 12(b)(6) motion that plaintiff soldiers lacked privacy interest in photos of their faces, and that their publication was newsworthy). Accordingly, the Court is fully empowered to determine whether the social media post revealed an "intimate detail" of Hogan's life, and whether publication was newsworthy.

Finally, Hogan fails to plausibly allege that his text message to Weymouth was "private" in any meaningful sense. Hogan has alleged no facts showing that Weymouth promised to keep his text communications with Hogan private. Hogan may be embarrassed by his words now, but he has not alleged facts showing a reasonable expectation of privacy in the texts. Hogan has thus failed to state a claim against Chung for public disclosure of intimate private facts.

V. THE COURT SHOULD DISMISS HOGAN'S CLAIMS WITH PREJUDICE

In its reply brief at pages 2-5, defendant Pro Sportority explained why the Court, having granted Hogan an opportunity to amend his complaint, need not afford him another bite at the apple. (Doc. No. 53 at 2-5 (citing, *inter alia*, *Aubrey v. Sontchez*, 18 F. App'x 529, 530 (9th Cir. 2001) (affirming dismissal where magistrate judge "adequately explained the deficiencies of [the] pleadings, afforded [plaintiff] ample time to amend his complaint, and explicitly warned him that failure to follow the court's final order would result in the dismissal of his action.")). Chung joins in those arguments.

Additionally—and significantly—when Hogan elected to stand on his original complaint, he knew of the reasons why personal jurisdiction did not exist as to Matthew Weymouth, and had reasonable notice that his claims against Patrick Chung were similarly vulnerable to dismissal. (Doc. No. 37). Accordingly, the Court should dismiss all of Hogan's claims with prejudice.

VI. CONCLUSION

For the foregoing reasons, Defendant Patrick Chung respectfully requests that this action be dismissed with prejudice for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), and for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6).

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Respectfully submitted,

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